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WHAT CONSTITUTES "UNREASONABLE DELAYS" IN FINALISING COURT CASES THAT LED TO THE WITHHOLDING OF MEMBERS' RETIREMENT BENEFITS?

SUMMARY

This paper discusses the approaches of both the High Court and the Office of the Pension Funds Adjudicator regarding delays that generally occur in the finalisation of court cases instituted by employers against their employees who are retirement-fund members. Particularly when such employees are alleged to have caused their employers' economic loss and employers wish to be compensated from their retirement benefits. This paper demonstrates that, while the concept of "unreasonable delay" is relied upon to determine whether retirement funds should release retirement benefits to their members pending the finalisation of employers' cases against them, both the courts and the adjudicator are yet to develop a workable test that can adequately guide them when deciding such disputes. This has also exposed retirement funds to continuous litigation regarding decisions that they take, in order to withhold their members' retirement benefits. This paper argues that there is a need for the judicial development of a test that can guide both the dispute-resolution institutions and boards of retirement funds on how employers' requests for the withholding of retirement funds' members' benefits based on court cases instituted by employers should be addressed. Particularly, when there are delays in the finalisation of such court cases.

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1. INTRODUCTION

Sec. 37D of the *Pension Funds Act*[1] empowers the boards of management of retirement funds to make certain deductions from their members' retirement benefits.[2] It is imperative to highlight that this provision must be interpreted in light of sec. 37A(1) of the *Pension Funds Act*, which generally prohibits the reduction of retirement benefits. Most significantly, sec. 37D is an exception to sec. 37A of the *Pension Funds Ac*t.[3] Within the employment context, the most contentious deductions from retirement benefits relate to those made because of employers' claims for damages against their employees who are contributing members of retirement funds and have caused their employers economic loss.[4] Many issues arise when retirement funds are requested to withhold their members' retirement benefits such as the need for retirement funds' boards to seriously scrutinise employers' requests and not merely to rubber-stamp such requests; the grounds that must be taken into account when decisions to withhold are taken, and the boards' role and responsibilities towards their members when deciding to withhold their retirement benefits.[5] One of the main practical concerns that arise relates to the 'permissible' length within which retirement benefits can withhold their members' retirement

1 *Pension Funds Act* 24/1956.

2 See *Twigg v Orion Money Purchase Pension Fund and Another* (1) 2001 12 BPLR 2870 (PFA):par. 20, where the Pension Funds Adjudicator (hereafter, "Adjudicator") pointed out that "[s]ection 37A of the Act establishes a general principle, in terms of which, the right to a pension benefit may not be reduced whatsoever other than the limited instances set out in the section itself. The section, *inter alia*, permits as an exception a deduction from a pension benefit for certain specified debts owing by the member, provided that the requirements contained in sec. 37D are met. In terms of sec. 37D(b), before a fund may deduct from a member's benefit, it has to comply with the following requirements: there must be an amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund; the amount must be in respect of compensation in respect of any damage caused to the employer; the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member; the member must either admit liability, in writing, to the employer or judgment must be obtained in any court; and the judgment or the written admission of liability must be in respect of the compensation due in respect of the damage caused. If these conditions are met, the fund may deduct the amount due by the member to the employer from the member's benefit payable in terms of the rules and pay it to the employer". See also *SA Metal Group (Pty) Ltd v Jeftha and others* 2020 JOL 46715 (WCC):par. 59; Marumoagae 2018:283.

3 See *Absa Bank Limited v Burmeister and Others* 2004 4 BPLR 5575 (SCA): par. 12, where it was held that "[t]he effect of section 37A (1) is to establish a general rule protecting pension fund benefits from inter alia attachment and execution. … Its object is clearly to protect pensioners against being deprived of the source of their pensions. The protection afforded by sec. 37A(1) is, however, subject to a number of exceptions, one of which is the exception provided for in section 37D(1) (*b*). That section, therefore, affords to an employer a right of access to pension fund benefits which other creditors do not have".

4 *Moodley v Scottburgh/Umzinto North Local Transitional Council and Another* 2000 4 SA 524 (D) 530.

5 See Marumoagae 2021:831.

benefits while employers are trying to establish their entitlement to be compensated by such members in the courts. This issue has not received any academic attention and courts appear to also casually deal with it despite its importance.

The purpose of this paper is to critically reflect on the judicial approaches in South Africa when retirement fund members demand to be paid their accrued retirement benefits as a result of lengthy court processes to which they are subjected by their employers, leading to the withholding of their benefits. In particular, this paper aims to assess whether courts have formulated a workable test that adequately guides retirement funds on the permissible length which they can withhold their members’ benefits at the behest of such members’ employers.

The discussion will be structured as follows. The second section below will briefly state the legal framework. The third section will evaluate how the adjudicator and the courts have dealt with delays that prevented the payment of retirement benefits, due to the court processes undertaken by employers. The fourth section will reflect on how the concept of ‘unreasonable delays’ in the context of withholding retirement benefits should be understood. Herein, an argument for the development of the judicial test will be made. The fifth section will conclude the discussion.

2. FROM DEDUCTING TO WITHHOLDING

There is no guarantee that employees, whose conduct or omission in the workplace caused their employers economic loss, will be financially capable to compensate their employers for the harm caused. The legislature has created a statutory security for employers who experienced harm at the hands of their employees who are retirement fund members to be compensated for the harm they suffered from such employees’ retirement benefits that are invested on their behalf by their retirement funds. Sec. 37D(1)(*b*)(ii) of the *Pension Funds Act* authorises boards of retirement funds to deduct amounts due to their members’ employers when members have exited these funds to compensate such employers for the damage caused to them. The damage suffered may have been caused by members’ theft, fraud, dishonest conduct, or misconduct.[6] The member’s conduct or omission must have directly led to the employer experiencing some economic harm that requires some form of monetary compensation.

When employers confront members with allegations of losses that they suffered at their hands, members can admit liability and compensate employers without the intervention of the retirement funds’ boards. This is seldom the case, and the legislature has created a legislative avenue for the involvement of retirement funds in the disputes between employers and employees regarding economic losses employers suffered at the hands of their employees. First, members can admit, in writing, that they caused

6 Sec. 37D(1)(b)(ii) of the *Pension Funds Act*.

their employers economic loss.[7] Such admissions would be provided to their retirement funds and would be the basis upon which deductions are made in favour of employers. This will lead to the immediate deduction from members' retirement benefits without the need for judicial intervention.[8] Secondly, if members, who alleged to have caused economic loss to their employers, do not admit liability in writing, employers have an option of approaching courts to establish members' liability. Employers can approach courts with jurisdiction to obtain orders against their employees. This clearly indicates the amount that such employees should compensate them, due to the harm they caused.[9]

In cases where members do not admit liability and employers are forced to approach the judiciary to establish such members' liability, usually members would have already exited their retirement funds, due to being dismissed by their employers or resignations. Dismissal and resignations are exit events that entitle members to be paid their benefits by their retirement funds. If members were to be paid their benefits before employers are able to complete court cases against them, court orders that employers may obtain in their favour may be rendered futile. At that time, members may have exhausted the benefits or the monies received may have been dissipated to the extent that employers may never get to be paid what they are owed. Members may also not own assets from which employers could receive their compensation. Both the adjudicator and the courts had to interpret the legislative authority for retirement funds to deduct retirement benefits in favour of employers where economic loss has been established as including the right to withhold such benefits pending the finalisation of employers' court cases.

The adjudicator in *Appanna v Kelvinator Group Services of SA Provident Fund*[10] determined that, where the retirement fund member did not admit liability, in writing, and the employer does not have a court order that orders the fund to compensate it from the members' retirement benefits, sec. 37D(1)(*b*)(ii) of the *Pension Funds Act* must be interpreted in such a way that enables employers to pursue their compensation. To achieve this purpose, "the provision for deduction should be interpreted to impliedly include the power to withhold payment of the benefit pending the determination or acknowledgment of liability".[11] The adjudicator's approach led to many retirement funds to make specific provision for the withholding of retirement benefits, pending the

7 Sec. 37D(1)(*b*)(ii)(*aa*) of the *Pension Funds Act*. See also *Kutting SA (Pty) Ltd v Old Mutual Superfund Provident Fund and another* 2023 1 BPLR 8 (PFA):par. 5.3.

8 Marumoagae 2021:822.

9 Sec. 37D(1)(*b*)(ii)(*bb*) of the *Pension Funds Act*.

10 *Appanna v Kelvinator Group Services of SA Provident Fund* 2000 2 BPLR 126 (PFA).

11 *Appanna* 2000:129. The Adjudicator reasoned that "[n]ormally an employer will have to utilise the court process to establish an employee's liability. Court proceedings invariably take a few months and, in some cases, years. If the fund were not permitted to withhold the employee's benefit in the interim, by the time proceedings were finalised, the employee may no longer be in a position to pay the employer's claim and the protection of the employer's property against an employee's misconduct … would thereby be rendered ineffective".

finalisation of court proceedings instituted by employers against members in their rules.[12]

The courts have endorsed the adjudicator's approach. The Supreme Court of Appeal, in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*, held that to not render the protection afforded to the employer by sec. 37D(1)(b) meaningless, its "wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability".[13]

Currently, the legal position is that retirement funds have discretion to withhold retirement benefits at the requests of employers who wish to pursue legal actions against their employees. These legal proceedings are intended to establish the liability of employees in respect of the harm they allegedly caused their employers to enable such employers to be compensated from the employees' retirement benefits.[14] Once retirement funds have withheld their members' accrued retirement benefits, the issue to be addressed is how long should such benefits remain in their custody.

3. DURATION OF WITHHOLDING BENEFITS

3.1 Protection of members' social insurance

It cannot be disputed that withholding members' accrued retirement benefits can have a devastating effect on their ability to care for themselves post their exit from their employment.[15] It is even worse when members' retirement benefits are withheld for extended periods and they are subsequently found not to be liable to compensate their employers. The discretion to withhold members' retirement benefits has a potential to threaten their right to social security. Social security includes several initiatives from both the government

12 See, for instance, rule 12.12.3.3 of the Mercedez-Benz South Africa Defined Contribution Provident Fund Rules that provides that "[t]he BOARD OF MANAGEMENT will have the right to withhold payment of benefits to which the MEMBER or beneficiary is entitled to in terms of the RULES pending the determination or acknowledgment of liability in terms of RULE 12.12.2 subject to such withholding period being reasonable taking into account the relevant circumstances and subject to the following provisions: The BOARD OF MANAGEMENT in its reasonable discretion is satisfied that the EMPLOYER has made out a *prima facie* case against the MEMBER concerned and there is a reason to believe that the EMPLOYER has a reasonable chance of succeeding in the proceedings that have been instituted."

13 *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 2 All SA 225 (SCA):par. 19. In coming to this conclusion, Maya JA (as she then was) on her unanimous judgment relied on the adjudicator's determinations such as *Appanna* 200; *Buthelezi v Municipal Gratuity Fund* (1) 2001 5 BPLR 1996 (PFA); *Allison v IMATU Retirement Fund* 2004 7 BPLR 5831 (PFA), which is a clear demonstration of the importance of the adjudicator's office and her determinations.

14 *Msimango v Ekurhuleni Metropolitan Municipality and another* 2015 JOL 35594 (GP):par. 12.

15 Matotoka *et al* 2014:660.

and the private sector that provide financial relief to individuals whose earning power has permanently ceased, interrupted, or never developed.[16] The social security system in South Africa has four major elements: private savings; social assistance; social relief and social insurance which includes joint contributions by employers and employees to pension or provident funds.[17] The concept of social security is a broader term, which includes social insurance that is primarily aimed at protection from want and hunger.[18] Retirement funds are effective tools that are intended to protect those who contributed to these funds over an extended period from being exposed to poverty.[19]

Retirement funding is part of retirement fund members' social insurance where they contribute with a view to have their monies invested over a period of time so that they can save enough to care for themselves when they are no longer working.[20] Art. 9 of the International Covenant on Economic, Social and Cultural Rights recognises the right to social security, including social insurance, as a fundamental right.[21] This right is likely to be threatened by not providing members their accrued retirement benefits when they are due or by preventing them from accessing these benefits for extended periods due to the unreasonable delays in court cases instituted by the employers against them. This can result when employers request retirement funds not to pay retirement fund members their benefits when they accrue to them or continue to withhold these benefits without just cause.

It is important to note that the right to social security is also recognised in South Africa.[22] Social security system is aimed at protecting members of society, irrespective of their level of income or socioeconomic status, from poverty.[23] Generally, non-contributory social assistance and contributory arrangements constitute two principal forms of social security.[24] Retirement funds form part of the contributory arrangements intended to protect members of these funds against old-age poverty. Retirement funds play an important social function of protecting retirement fund member not only against poverty during retirement but also disability and reduction or lack of income when they are forced to exit their retirement funds before their retirement age. As such, any restriction towards their retirement benefits particularly when they exit their retirement funds, due to any reason other than death and retirement must be legally defensible, otherwise their right to social security, which includes social insurance in the form of retirement benefits, will be infringed upon. In

16 White Paper 1997:49.
17 White Paper 1997:49
18 Naik 2016:1.
19 See Ncamane 2022:815, who correctly argues that social insurance schemes such as retirement funds "… are contributory in nature depending on both the employee and employer …". See also Nevondwe 2010: 289, where it is stated that "[m]ost people in formal sector jobs contribute to pension, provident or retirement annuity funds and some people save enough in this way to be able to live adequately in retirement".
20 See, generally, Van den Heever:8.
21 Smit & Mpedi 2010:15.
22 Sec. 27(1)(c) of the *Constitution* of 1996.
23 Inter-Departmental Task Team on Social Security and Retirement Reform 2012:10.
24 Inter-Departmental Task Team on Social Security and Retirement Reform 2012:10.

terms of sec. 27(1)(*c*) of the *Constitution* of 1996, "[e]veryone has the right to have access to social security …".[25] Members of retirement funds should not unreasonably be denied access to their retirement benefits or be forced to wait for extended periods before they are provided their benefits. Members should not be unreasonably prejudiced by their retirement funds' decisions to withhold their retirement benefits. In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen,*[26] the Supreme Court of Appeal held that:

> Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and, in the process, balance the competing interests with due regard to the strength of the employer's claim. They may also impose conditions on employees to do justice to the case.

This implies that retirement funds must carefully consider how their decisions to withhold their members retirement benefits will affect them. This is not a decision that should be made lightly. The decision to withhold retirement benefits must be taken based on substantiated allegations from employers where it has been objectively demonstrated that courts have been approached to establish liability. Most importantly, when deciding to withhold retirement benefits, retirement funds must adequately balance the potential harm that members will suffer should their benefits be withheld against the potential harm to the employers should such benefits not be withheld.[27] If the employer succeeds in convincing the fund that there will be greater harm to itself, should the retirement benefits be released to the member pending the finalisation of court processes instituted by the employer, the practical question remain; What will constitute a reasonable period for such retirement benefits to be withheld by the retirement fund? In other words, while it is clear that retirement funds have discretion to withhold their members' retirement benefits, it is not entirely clear for how long these benefits can be withheld in such a way as to not to interfere with members' right to access their social security, which includes social insurance.

3.2 Duration of withholding benefits

The adjudicator and the courts appear to be of the view the period of withholding members' retirement benefits to allow employers an opportunity to establish such members' liability through the courts must be reasonable.[28] Further that "… what constitutes a reasonable period will differ depending

25 See also Basson 2020:852.

26 *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 2 All SA 225 (SCA):par. 20.

27 *Radebe* 2020:par. 5.8.

28 See *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane N.O and Others* [2021] ZAGPPHC 773 (10 November 2021):par. 46; *Royal Bafokeng Platinum Limited and another v The Pension Funds Adjudicator and others* PFA81/2020 (FST):par. 27; *Harbottle v Everest Corporate Benefits Preservation Provident Fund and another* 2014 JOL 31422 (PFA):par. 5.4, and *Adam v Consolidated Retirement Fund for Local Government and another* 2023 1 BPLR 1 (PFA):par. 5.9.

on the circumstances of each case".[29] It is also trite that delays in finalising court proceedings against members to claim compensation for loses allegedly suffered by employers must not be attributed to employers and retirement funds.[30] Employers should not be allowed to effectively prevent members from receiving their benefits, due to court proceedings they instituted but failed to finalise.

When deciding to withhold members' retirement benefits, the boards of retirement funds have statutory duties such as the duty of care with which they must comply. The duty of care requires boards of retirement funds to adequately evaluate competing interests with a view to assessing whether it is reasonable to continue to withhold their members' retirement benefits or such benefits should be released, notwithstanding, the fact that court proceedings instituted by employers have not been concluded.[31] This duty is the foundation within which boards of retirement funds can adequately assess the reasonableness of the period that their members' retirement benefits have been withheld at the request of employers. This duty reinforces the boards' duty to "… take all reasonable steps to ensure that the interests of members in terms of the rules of the fund … are protected at all times".[32]

To prevent members of retirement funds from being prejudiced, boards require constant and consistent guidance from both the adjudicator and the courts, which has not been forthcoming. This has led to boards of retirement funds taking withholding decisions that have been constantly challenged by their members because members also do not have adequate guidance on the precise circumstances under which their retirement benefits can be withheld pending the never-ending court cases against them. The adjudicator has been consistently called to determine these disputes.

3.2.1 Adjudicator's approach

In *Maharaj v Corporate Selection Umbrella Retirement Fund No: 2 and others,* the former retirement fund member lodged a complaint with the adjudicator wherein he complained that his retirement fund withheld his retirement benefit after his former employer opened a criminal case against him.[33] Six years after his retirement benefits were withheld, neither a criminal nor a civil case was opened against him. He argued further that the employer falsely claimed that the case against him cannot proceed because the prosecution was awaiting the outcome of a case between him and the South African Revenue Services.[34]

29 *Naidoo v 10X Umbrella Pension Fund and others* 2022 5 BPLR 102 (PFA):par. 5.3.

30 *Sayed- Essop v Non-Ferrous Metal Works Pension Fund and Another* 2000 9 BPLR 1051 (PFA):par. 14.

31 See *Southern Sun Group Retirement Fund v Registrar of Pension Funds and Others* (215/2019) [2020] ZASCA 142 (2 November 2020):par. 47. See also sec. 7C(2)(*b*) of the *Pension Funds Act*, which stated that "[i]n pursuing its object the board shall act with due care, diligence and good faith".

32 Sec. 7C(2)(a) of the *Pension Funds Act*.

33 2023 1 BPLR 10 (PFA):par. 3.1

34 *Maharaj* 2023:par. 3.1.

Further that his former retirement fund accepted the employer's claim without independently verifying the information it was fed by the employer. In reply, the retirement fund contended that the member was dismissed from his employment in 2016 and the employer informed it that it intended to institute legal action against him. The fund conceded that the case against its former member has not been concluded. Further that the delays were occasioned by some of the accused persons who had issues with their legal representatives, which have since been resolved and the matter has been set down for pre-trial hearing in 2022.[35]

The evidence before the adjudicator indicated that the fund failed to adequately follow up on the criminal proceedings to ensure that the member's retirement benefits are not withheld for an unreasonable length of time. In particular, the retirement fund failed to provide details of what transpired between 2016 and August 2020 and could only provide the adjudicator with progress of the criminal case from 9 September 2020.[36] Contrary to the member's contention, the adjudicator found that there is a criminal case opened against him, but that there was no progress in that case which is still being further investigated.[37] The adjudicator outlined several important principles that must guide retirement funds when deciding to continue withholding their members' retirement benefits, which she was of the view that, in this case, the board failed to observe.[38]

First, the boards of retirement funds must insist on accurate timeous information regarding court processes that have led to the withholding of their members' retirement benefits.[39] Retirement funds should not wait for employers to provide them with information but should actively and continuously seek out updates on the progress of the case. This includes every court date and reasons for the matter not being finalised on the prescribed court date. This information must be provided to the fund immediately after the court proceedings or soon thereafter. If the employer failed to voluntarily provide such information, the retirement fund's administrator should actively seek out such information from the employer. Regular updates will empower retirement funds to assess the reasonableness of continuing to withhold their members' retirement benefits and assist them to adequately consider the respective rights of employers and their members.[40]

Secondly, through regular updates, boards of retirement funds must review circumstances that led to the delays in the finalisation of cases brought by employers against their members objectively. This clearly demonstrates that boards of retirement funds must prioritise following up on court cases instituted by employers against their members. By so doing, the board of a retirement fund will be able to consider whether its members are "… being unduly prejudiced and whether the continued withholding of their retirement

35 *Maharaj* 2023:par. 4.8.
36 *Maharaj* 2023:par. 5.6.
37 Maharaj 2023:par. 5.8.
38 *Maharaj* 2023:par. 5.8.
39 *Maharaj* 2023:par. 5.9.
40 *Maharaj* 2023:par. 5.9.

benefits is justified".[41] Obviously, retirement funds' members will be prejudiced when court cases are perpetually postponed and there is no concerted effort to finalise them. Never-ending investigations that do not yield positive results that can enable the prosecution to prosecute retirement fund members would also be extremely prejudicial to these members and potentially infringe on their right to social security that includes social insurance in the form of retirement benefits.

In *Maharaj*, the adjudicator found that the board of the fund only made five follow-ups in a period of six years when it received inquiries from the adjudicator's office. Further that the fund failed to continuously engage the employer on the progress of the criminal case on its own.[42] The adjudicator was of the view that this matter took "… a considerable number of years since the criminal proceedings were instituted and there is still no prosecution or a notice of set down".[43] She determined that "… the conduct of the board falls far short of that of a reasonable board that must exercise fiduciary duties in a fair and equitable manner".[44] Further that there was lack of fairness on the side of the board of the fund which prevented it from adequately balancing the competing interests of both the member and the employer.[45] The adjudicator set aside the fund's decision to withhold the member's benefits, due to the criminal case that the employer opened, and ordered the fund to pay the member his withdrawal benefit.[46]

While the outcome may be regarded as correct, it is disappointing that the adjudicator did not engage the concept of what is the reasonable time that is acceptable for retirement funds to withhold their members' benefits based on court proceedings instituted by employers against such members, even in the circumstances of this case. It is not clear, had the fund been proactive and regularly requested the employer to update it on the progress of the criminal case, whether that would have rendered the six-year period for which the member's retirement benefits were withheld by the retirement fund reasonable. There is currently no test that the adjudicator uses to formulate a view whether the delays, which have been experienced in finalising court cases where employers are attempting to obtain orders that entitle them to be compensated by members as their former employees, are reasonable. Even when the adjudicator defers to the circumstances of each case, she does not explain what renders the delay either reasonable or unreasonable.

41 *Maharaj* 2023:par. 5.9.

42 See *Jonck v Retail and Allied Employees Provident Fund and another* 2023 1 BPLR 6 (PFA):par. 4.4, where the fund undertook to "… continue to monitor the progress of the legal action instituted against the complainant and would endeavour to ensure that the matter is not unduly delayed and finalised within a reasonable time".

43 *Maharaj* 2023:par. 5.10.

44 *Maharaj* 2023:par. 5.10.

45 *Maharaj* 2023:par. 5.10.

46 Maharaj 2023:par. 6. Without explaining what more should be done, the adjudicator opined that "[t]he mere opening of a criminal case cannot in and of itself constitute good grounds for the fund to continue to withhold the benefit" (par. 5.12).

In *Naidoo v 10X Umbrella Pension Fund and other*s, the adjudicator previously determined in 2017 that the employer should be provided an opportunity to pursue legal remedies against the member and that the retirement fund could withhold his benefit for a reasonable period.[47] Among the orders made by the adjudicator was that "[t]he fund and its board should keep abreast with the criminal proceedings and ensure that the withholding does not endure for an 'unreasonable length of time'".[48] The member challenged both the adjudicator and the fund to clarify what the phrase 'reasonable length of time' meant in the context of withholding his retirement benefits pending the case that his former employer opened against him.[49] The member's retirement benefit was withheld in 2014 on the strength of the criminal case his former employer opened against him. The adjudicator found that the retirement fund only inquired, once in seven years, from the employer on the progress of the criminal case, which enquiry was made about forty-four months from the date the adjudicator ordered the fund to make such inquiries.[50]

Without providing the member with clarity on what constitutes an unreasonable length of time, the adjudicator set aside its earlier decision to allow the fund to continue to withhold the member's retirement benefits. It is also not clear on this matter, had the fund been consistent in following up on the progress and informed the member accordingly, whether the seven-year delay in finalising the criminal case would have been declared reasonable. It appears that the adjudicator finds the retirement funds' failure to be pro-active and not necessarily the amount of time taken to finalise these court cases, objectionable. Where retirement funds are proactive and regularly request updates from employers on the progress of court cases, delays that occur within the justice system, which are out of the funds and employers' control, would generally be held to be reasonable, provided employers are not complicit in these delays.[51] Once they have instituted legal proceedings, employers are generally not allowed to be passive and allow time to pass without any progress in their court cases.

In *Buthelezi v Municipal Gratuity Fund and Another*, the employer failed to expedite the matter leading to the member's retirement benefits being withheld for just under two years.[52] The adjudicator found this to be an unreasonably long delay and in excess of the fund's implicit power to withhold the member's retirement benefits.[53] In *Maritz v Bidcorp Group Retirement Fund & another,* the adjudicator determined that, if the withholding of retirement benefits persists for much longer, the board need to consider paying the benefit to the member.[54] The adjudicator did not provide clarity on what "much longer"

47 *Naidoo v 10X Umbrella Pension Fund and other*s [2022] 5 BPLR 102 (PFA):par. 2.1.
48 *Naidoo* 2022:par. 3.2.
49 *Naidoo* 2022:par. 3.3.
50 *Naidoo* 2022:par. 5.5.
51 *Ncobela v Edcon Provident Fund and others* [2014] 1 BPLR 99 (PFA):par. 4.4.
52 *Buthelezi v Municipal Gratuity Fund and Another* 2001 5 BPLR 1996 (PFA).
53 *Buthelezi* 2001:par. 20.
54 *Maritz v Bidcorp Group Retirement Fund & another* 2011 JOL 27012 (PFA):par. 5.5.

meant and when exactly the criteria of "much longer" will be met for the fund to release the retirement benefit to the member.

It is also unfortunate that the adjudicator, in her several determinations dealing with this topic, has not in any of them outlined some of the main factors that lead to the delays in finalising court processes instituted by employers against retirement fund members with a view of suggesting how these challenges could be addressed. The adjudicator is yet to provide clarity on what constitutes unreasonable or reasonable delays. Unfortunately, the high court has also not been very helpful in this regard.

3.2.2 High Court's approach

In *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane N.O and Others,* it was pointed out that "… employer cannot be allowed to withhold the benefit indefinitely. Should the employer's liability not be determined within a reasonable period, the fund is not entitled to withhold the benefits".[55] In this case, the member's employment was terminated in February 2020. In May 2020, the fund informed the member that it was going to withhold his withdrawal benefit, due to the harm that he allegedly caused his employer. At the time, and due to the COVID-19 pandemic, the employer had not instituted any legal proceedings against the member.[56] The member's benefits were withheld on the strength of the letter that the employer wrote to the retirement fund. The court was of the view that the fund failed to contact the member regarding the withholding of his retirement benefits within a reasonable time.[57] In November 2022, the employer instituted civil action against the member to recover damages arising from the loss it allegedly suffered at the hands of the member as its employee.[58]

The court criticised the timing of the institution of legal proceedings by the employer. Like the adjudicator, the court did not explain what the phrase 'unreasonable delays' entails in the context of withholding retirement benefits at the employer's request. The court held that the fund failed to investigate whether there were unreasonable delays in the finalisation of the dispute between the employer and the member, with summons only being issued almost nine months after the member's resignation.[59] This suggests that retirement funds have a duty towards their members, when employers request that retirement benefits be withheld, to ensure that legal proceedings have been instituted at the time such requests are made. In other words, retirement funds should not agree to withhold their members' retirement benefits

55 *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane N.O and Others* (65635/2020) [2021] ZAGPPHC 773 (10 November 2021):par. 44. See also Momentum 2021:3, where it is argued that "[a] fund is not allowed to withhold a benefit indefinitely at the request of an employer as members must be protected against any potential prejudice they may suffer as a result of the infringement of their right to be presumed innocent until found guilty".

56 *Scientia Optimate Financial Services (Pty) Ltd* 2021:par. 44.

57 *Scientia Optimate Financial Services (Pty) Ltd* 2021:par. 46.

58 *Scientia Optimate Financial Services (Pty) Ltd* 2021:par. 45.

59 *Scientia Optimate Financial Services (Pty) Ltd* 2021:par. 47.

merely on the strength of letters sent to them by employers indicating their intention to institute legal proceedings. Employers should first institute legal proceedings and thereafter approach retirement funds with proof that such proceedings have been instituted. Employers should not delay in instituting these proceedings.

In *Jacobs v Telkom and Others,*[60] the member resigned from his employment in 2012 upon being confronted with misconduct allegations. In 2013, the employer instituted a criminal case against the member which led to the fund withholding his retirement benefit. In 2014, the employer instituted civil proceedings against the member claiming damages from him. The member raised an exception which was later withdrawn. The court held that the member "… had a duty to enquire about the progress and status of the matter, if he insisted on a prompt finalization of it".[61] In November 2019, the member was informed by police that the case against him had been withdrawn.[62] However, in 2021, the member received information from the prosecution that the criminal matter against him is proceeding. The member was not happy that, despite the long delay, the criminal case had not been finalised despite blocking his retirement benefits from being paid to him. The member argued that the employer caused inordinate delay by failing to proceed with both the civil claim and the criminal case against him to his prejudice.[63]

The employer argued that it was requested by the prosecution to hold the civil matter over, pending the finalization of the criminal matter, and that it did not have control over the delays associated with the prosecution of the criminal case.[64] The court acknowledged that there had been an inordinate delay in the finalisation of the dispute between the member and the employer.[65] However, the court was of the view that both parties contributed towards the delay. Most importantly, the court held that "[a]lthough it has been made clear that the employer should not be the cause of the delay, the employee also has a duty not to contribute to any delay and can hardly put the blame on the employer, if he contributed to the delay".[66] The court held further that the delay in this matter cannot be regarded as unreasonable, due to the member's exception, prosecution non-responsiveness, and the failure by both the employer and the member to pursue the civil litigation to finality.[67] The court was of the view that these facts amounted to exceptional factors that rendered the delay not to be unreasonable, which delay would have been unreasonable had these factors been absent.[68]

This seems to suggest that the reasonableness of the delay in finalising court proceedings instituted by employers against employees is assessed

60 *Jacobs v Telkom and Others* (2022) 43 ILJ 1902 (GP).
61 *Jacobs* 2022:par. 15.
62 *Jacobs* 2022:par. 12.
63 *Jacobs* 2022:par. 17.
64 *Jacobs* 2022:par. 18.
65 *Jacobs* 2022:par. 21.
66 *Jacobs* 2022:par. 21.
67 *Jacobs* 2022:par. 21.
68 *Jacobs* 2022:par. 21.

based on the conduct or inaction of employers. If the delays are attributed to the court system and the members, such delays would not be regarded as unreasonable. It is important that court cases instituted by employers against their members, which are intended to enable employers to be compensated from members' retirement benefits, are speedily resolved.

In *Jacobs*, the employer prejudiced the member by instituting criminal proceedings and not providing the prosecution with enough evidence to proceed with the case. Realising that the criminal matter was not going anywhere, the employer instituted civil proceedings which interfered with criminal investigations. Had civil proceedings not been instituted in 2014 in the middle of criminal proceedings, the employer's attention could not have been divided and could have assisted the prosecution to speedily conclude the criminal case. At the time, there was already commitment from the prosecution to escalate and enrol the criminal matter.[69] It cannot be doubted that the matter could only be escalated and enrolled based on the evidence the employer provided to the prosecution.

However, at the time, the employer's attention was already divided and it was preparing a civil case where the burden of proof is less, that of balance of probabilities. The member's contribution to the delays was a direct result of multiple court proceedings to which he was exposed by the employer. With respect, the court failed to adequately deal with the delays in finalising the criminal matter and to realise that the civil matter was merely a knee-jack reaction to the lack of progress of the criminal proceedings. This denied the court the opportunity to engage what amounts to 'unreasonable delays' and whether in this matter the delay was unreasonable to entitle the fund to pay withheld retirement benefits to the member. The cases discussed above demonstrate that the High Court, like the adjudicator, has not yet developed a workable test that can adequately guide not only future cases, but also boards of retirement funds when confronted with requests from employers to withhold their members' retirement benefits.

While it is understandable why the circumstances of each case should provide some guidance whether the delay that resulted in any specific case is reasonable, dealing with cases on a case-to-case basis has a potential to lead to inconsistencies. Particularly, when the only objective factor that will not render the delay unreasonable is whether employers contributed to such delays. This approach prevents both the adjudicator and the courts from seriously engaging circumstances that lead to the delays and can potentially be prejudicial to retirement fund members. It is important that some kind of test be developed to guide both the adjudicator and the courts to adequately evaluate whether the delays in finalising cases before them are unreasonable.

69 *Jacobs* 2022:par. 18.

4. UNREASONABLE DELAYS

It is not clear what amounts to unreasonable delays in the context of retirement benefits that are withheld by retirement funds at the request of employers with a view to allow such employers an opportunity to prosecute their claims against retirement fund members in the courts. Nonetheless, employers' inaction and carefree attitude in finalising these cases may provide some guidance as to whether the delay in a particular case is unreasonable. Particularly when an employer has demonstrated lack of diligence in instituting the court process, or where such process has been instituted, the employer dragged its feet in ensuring that the matter is finalised. The conduct of the employer must be such that the member's social insurance is threatened by the continued withholding of his or her retirement benefits.

In *Cassimjee v Minister of Finance*, Mthiyane DP cautioned that "[a]n inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action".[70] Such an abuse appears to be inherent in the context of retirement benefits that have been withheld pending the finalisation of court cases instituted by employers against retirement fund members as their employees. It appears that there is a general acceptance that there are delays associated with the South African justice system which are beyond the control of employers who instituted these claims. However, neither the adjudicator nor the courts have seriously evaluated the main reasons that lead to these delays, with a view to assessing how they can be avoided. It has been argued that "[a]n unreasonable delay in prosecuting or finalising a case vitiates the credibility of the resultant outcome and could even border to abuse of process".[71]

Currently, both the courts and the adjudicator declare delays to be unreasonable when the employer has breached what appears to be an "obligation" on the part of the employer not to hinder or delay the finalisation of the case before the court. In other words, the unreasonableness of delays is viewed in light of the employer's conduct or omission. While this may be a good indicator of the unreasonableness of the delay, it is submitted that a test should be developed to adequately guide both the courts and the adjudicator when determining the unreasonableness of delays regarding the cases brought by employers against retirement fund members. It is worth noting that, in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others,* the Constitutional Court endorsed the view that the longer the delay, the more likely it would be unreasonable.[72]

In developing such a test, there will first need to be a thorough understanding of the processes involved in both criminal and civil proceedings. This includes inherent procedures that can lead to various postponements. Secondly, various factors from previous determinations and judgments that provided insights of what led to the delays in those matters should be collated and

70 *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA):par. 10.
71 Khumalo 2020:657.
72 *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* 2019 40 ILJ 773 (CC):par. 71.

highlighted with a view to understanding the root cause of these delays. For instance, it is already recognised that the court system has inherent delays but the content of these delays has not yet been highlighted. Should what causes these delays be adequately identified, processes may be put in place to address these delays. For instance, various heads of courts across the country may prioritise cases where employers wish to establish liability with a view to being compensated from members' retirement benefits, given their socio-economic implications for retirement fund members.

5. CONCLUSION

This paper attempted to demonstrate that both the adjudicator and the courts have not yet developed a test that can be used to determine what constitutes unreasonable delays in the finalisation of court cases instituted by employers against retirement fund members. Currently, it is not clear what would justify members being paid their benefits, even though cases brought against them are yet to be finalised. Most of the determinations discussed above clearly demonstrate the casual tendency by some employers to merely start court proceedings that they have no desire to complete. Retirement funds are also complicit in this behaviour, by not regularly following up on the progress of the court cases instituted against their members by these employers. It was argued that a workable judicial test that can adequately guide both the courts and the adjudicator on their determination of whether there has been an unreasonable delay in the circumstances must be developed.

BIBLIOGRAPHY

BASSON Y

2020. The compliance of the South African social security system with the international covenant on economic, social and cultural rights. *Obiter* 41(4):850-870. https://doi.org/10.17159/obiter.v41i4.10491

INTER-DEPARTMENTAL TASK TEAM ON SOCIAL SECURITY AND RETIREMENT REFORM

2012. Comprehensive social security in South Africa: Discussion document Vervios 11.9. https://static.pmg.org.za/161128Comprehensive_Social_Security_in_South_Africa.pdf (accessed on 2 June 2023).

KHUMALO B

2020. Procedural unfairness occasioned by unreasonable delay in finalising a disciplinary inquiry *Obiter* 41(3):651-661. https://doi.org/10.17159/obiter.v41i3.9588

MARUMOAGAE C

2018. An argument for necessary amendments to the legislative provisions regulating the sharing of retirement savings upon divorce in South Africa. *South African Mercantile Law Journal* 30(2):280-301.

2021. What are the duties (if any) of retirement funds boards which are requested by employers to withhold members' retirement benefits? *South African Law Journal* 138(4):818-843. https://doi.org/10.47348/SALJ/v138/i4a7

MATOTOKA D, NEVONDWE L & ODEKU KO
2014. Withholding pension benefits in South Africa: A nightmare for pension fund members. *Mediterranean Journal of Social Science* 5(15):647-651. https://doi.org/10.5901/mjss.2014.v5n15p647

MOMENTUM
2021. Legal Update 3.

NAIK DN
2016. Social security and social insurance. *Journal of Civil & Legal Sciences* 5(5):1-4. https://doi.org/10.4172/2169-0170.1000206

NCAMANE N
2022. The administration of social security in the midst of Covid-19: A need for a specialised and independent social security adjudication system in South Africa. *Obiter* 43(4):812-833. https://doi.org/10.17159/obiter.v43i4.15413

NEVONDWE L
2010. South African Social Security and Retirement Reform: A long journey towards the redrafting of the new *Pension Funds Act*. *Pensions* 15(4):287-296. https://doi.org/10.1057/pm.2010.19

VAN DEN HEEVER A
2021. Social security/protection in South Africa. https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/wits-school-of-governance/documents/Social%20Protection.pdf (accessed on 20 February 2023).

SMIT N & MPEDI G
2010. Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy? *Law, Democracy & Development* 14(3):1-33. https://doi.org/10.4314/ldd.v14i1.4